On February 10, 2009, petitioner, a state prisoner appearing *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to the Honorable Anthony J. Battaglia, United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)B) and Local Rule HC.2(a). On April 8, 2009, respondent filed a motion to dismiss the petition as untimely and petitioner filed an opposition to the motion on May 29, 2009. Judge Battaglia issued a report and recommendation ("report") on June 26, 2009, recommending that this Court dismiss the petition, finding that the petition was untimely filed and petitioner was not entitled to statutory or equitable tolling based on the record presented. Petitioner filed objections to the magistrates judge's findings and conclusions contained in the report on August 3, 2009. This Court subsequently overruled petitioner's objections, adopted the report it its entirety and dismissed the petition as untimely filed.

On November 16, 2009, petitioner filed a notice of appeal. *See* Doc. # 14. Although petitioner did not expressly request a certificate of appealability concurrently

with his notice of appeal, this Court *sua sponte* considers whether a certificate of appealability should be granted. *See* Fed.R.App.P. 22(b); <u>United States v. Asrar</u>, 116 F.3d 1268, 1270 (9th Cir. 1997)("If no express request is made for a certificate of appealability, the notice of appeal shall be deemed to constitute a request for certificate.").

A certificate of appealability is authorized "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this threshold showing, a petitioner must show: (1) the issues are debatable among jurists of reason; or (2) that a court could resolve the issues in a different manner; or (3) that the questions are adequate to deserve encouragement to proceed further. <u>Lambright v. Stewart</u>, 220 F.3d 1022, 1024-25 (9th Cir. 2000)(citing <u>Slack v. McDaniel</u>, 529 U.S. 473 (2000) and <u>Barefoot v. Estelle</u>, 463 U.S. 880 (1983)).

Here, petitioner appeals this Court's order dismissing the petition for writ of habeas corpus as untimely filed. In overruling petitioner's objections and dismissing the petition, this Court agreed with the magistrate judge's determination that the one-year statute of limitations, set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), applies to petitioner's federal habeas petition and, absent statutory or equitable tolling of the statute, petitioner's federal habeas petition was untimely filed. This Court further agreed with the magistrate judge that neither statutory nor equitable tolling of the statute of limitations was available to petitioner under the circumstances here. Therefore, this Court adopted the magistrate judge's recommendation in full and dismissed the petition as untimely.

This Court finds that a certificate of appealability is not warranted in this instance because the dismissal of the petition under the circumstances here is not an issue debatable among jurists of reason nor could any other court resolve the issue in a different

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manner. Lambright, 220 F.3d at 1024-25. Accordingly, this Court **DENIES** a certificate of appealability in this case. IT IS SO ORDERED. DATED: November 30, 2009 JOHN A. HOUSTON United States District Judge 

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